

The European Union Constitution and its Effects on Federalism in the EU

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Since its unveiling in May 2003 and approval by the Intergovernmental Conference in June 2004, the European Union Constitution has sparked intense debate. If ratified by Member States, the Constitution will inaugurate a new era in the distribution of power between the EU institutions and Member State governments. This Note will examine the Constitution in the historical context of EU integration and examine how its changes vis-à-vis current EU governing treaties affect federalism in the EU. It will be shown that any decline in Member State sovereignty that may result from certain provisions of the Constitution is justifiable in light of the needs to streamline the functioning of the EU in the wake of enlargement and to ensure greater coordination in the areas of common foreign and security policy and justice and home affairs.

I. INTRODUCTION

The future of the European Union (EU) stands to be shaped in a profound manner by the EU Constitution agreed to by European heads of state on June 18, 2004.¹ This document represents the culmination of the most ambitious reorganization in the EU's half-century of existence.² While the Constitution has met with criticism,³ European heads of state and the framers of the Constitution recognized the need for the EU to codify the series of overlapping and often opaque treaties that have governed the EU over the course of its history.⁴ In addition to rendering pre-existing treaties more coherent and accessible to ordinary Europeans, the Constitution introduces many new measures designed to enhance the functioning of the EU institutions in the wake of enlargement from fifteen to twenty-five

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¹ Paul Reynolds, *Constitution a Hard-Won Compromise*, BBC NEWS ONLINE (June 18, 2004), at <http://news.bbc.co.uk/2/hi/europe/3820557.stm>.

² Markus G. Puder, *Constitutionalizing the European Union—More Than a Sense of Direction from the Convention on the Future of Europe*, 26 FORDHAM INT'L L.J. 1562, 1562 (2003). The Constitution was written by 105 delegates during the course of the Convention on the Future of Europe. *Id.* at 1574. Valérie Giscard d'Estaing, the former French president, acted as the chairman of the Convention which began deliberations on February 28, 2002. *Id.* See *infra* Part II, and accompanying notes 43–47 for further details on the writing of the Constitution.

³ *Tidying Up or Tyranny?*, ECONOMIST, May 31, 2003, at 51 (A federalist and former German member of the Convention felt that the draft constitution represented an “unraveling of the federalist dream.”).

⁴ *Where to File it*, ECONOMIST, June 21, 2003, at 10.

countries in 2004 and the prospect of future enlargement within the next decade.⁵

Transforming the EU from an entity governed by treaties to one governed by a constitution is significant when one considers the difference between a constitution and a treaty. A constitution establishes the basic principles and laws of a nation-state, defines the powers and duties of the government, and guarantees certain rights to the people.⁶ Treaties, on the other hand, are international agreements concluded between nation-states in written form and are governed by international law.⁷ The existing EU treaties act as a *de facto* constitution.⁸ However, pursuant to these treaties, the EU lacks many of the fundamental qualities that characterize a nation-state governed by a constitution.⁹ It is this lack of a constitution that has sparked academic arguments over the degree to which the EU can be considered a federalist entity.¹⁰ A federalist approach in the EU context entails the adoption of a form of political organization in which the exercise of power is divided between the central government and Member State governments, each having the use of those powers as a matter of right, and each acting on the same citizen body.¹¹ Achieving a viable federal system requires a linking of individuals, groups, and polities in a lasting but limited union so as to provide for the pursuit of common goals, while still maintaining the integrity of all parties.¹²

In this Note, it will be shown that the Constitution succeeds in streamlining the functioning of the EU to enable it to more effectively

⁵ The European Union expanded from fifteen to twenty-five Member States in May 2004. New Member States included Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. *Q&A: EU Enlargement*, BBC NEWS ONLINE (June 18, 2004), at <http://news.bbc.co.uk/1/hi/world/europe/2266385.stm>. Four other countries including Bulgaria, Romania, Croatia, and Turkey are candidates to join in the future. *Id.*

⁶ See SIONAIDH DOUGLAS-SCOTT, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 516 (2002).

⁷ See Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, 1155 U.N.T.S. 331, 333

⁸ DOUGLAS-SCOTT, *supra* note 6, at 518.

⁹ The EU lacks the full sovereignty characteristic of a modern nation-state as well as the ties and affinities with its people that are characteristic of a country governed by a constitution. *Id.* at 518–19. Additionally, the EU possesses an incomplete system of governance. *Id.*

¹⁰ Barbara Crutchfield George, et. al., *The Dilemma of the European Union: Balancing the Power of the Supranational EU Entity Against the Sovereignty of its Independent Member Nations*, 9 PACE INT'L L. REV. 111, 116 (1997).

¹¹ *Id.* at 114.

¹² Christoph Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity*, 20 BERKELEY J. INT'L L. 359, 363 (2002).

achieve the common goals of its members, while not unduly infringing on their sovereignty. Unlike the United States Constitution, the EU Constitution does not aim to establish a strong central government with the power to collect taxes¹³ directly from the people or to resort to the use of force without input from individual states.¹⁴ While the EU Constitution does not establish the same type of federation familiar to Americans, it does go farther in creating a centralized EU governing structure¹⁵ that is better equipped to deal with an EU of twenty-five Member States instead of fifteen and to enable the EU to play a more important role in the international diplomatic and military scene.

After providing a brief history of federalism in the EU in Part II as a context for the current constitutional debate, this Note will examine the federalist implications of the Constitution on each of the three pillars. With respect to the European Community pillar, Part III examines the current division of power between Member States and the EU policy-making institutions, including the European Commission, the Council of Ministers, the European Parliament, the European Council, and the European Court of Justice. The complementary concepts of supremacy and subsidiarity will also be addressed in connection with the discussion about the relationship between EU law and national law. Provisions of the Constitution directly affecting these concepts as well as the distribution of power between Community institutions and Member States will then be analyzed in-depth. Part IV examines the common foreign and security policy and justice and home affairs pillars which have traditionally been marked by more

¹³ *What the EU Constitution Says*, BBC NEWS ONLINE (June 22, 2004), at <http://news.bbc.co.uk/2/hi/europe/2950276.stm#s3>. EU nationals have never sent a year-end check to a European revenue service, although the Council of Ministers can and has forced Member States to pay the costs of participation in the Union. Ilann Margalit Maazel, *What Is the European Union?*, 16 BYU J. PUB. L. 243, 249 (2001).

¹⁴ While the EU constitution contemplates a common defense and security policy, individual Member States still possess veto power. Treaty Establishing a Constitution for Europe [hereinafter Constitution for Europe], August 6, 2004, art. I-40(4), <http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf> (stating that "European decisions on the implementation of the common security and defense policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council of Ministers acting unanimously on a proposal from the Union Minister for Foreign Affairs or from a Member State."). For a more thorough treatment of this subject, see Part IV.A.

¹⁵ Henceforth, there will be only one European Union replacing the current three "pillar" structure for distribution of power between the Union and the Member States. Summary of the Agreement on the Constitutional Treaty, June 28, 2004, http://europa.eu.int/futurum/documents/other/oth250604_2_en.pdf (last visited Mar. 10, 2005). Under the current structure, the three pillars include the European Community pillar, the common foreign and security policy pillar, and the justice and home affairs pillar. See *infra* notes 16–17.

intergovernmentalism than the supranational Community pillar. The provisions of the Constitution affecting the distribution of power in these areas will then be analyzed.

This Note ultimately aims to demonstrate that any decline in Member State sovereignty that may result from certain provisions of the Constitution is justifiable in light of the collective benefits accruing to European citizens and the European Union as an organization.

II. HISTORY OF FEDERALISM IN THE EUROPEAN UNION

In order to effectively measure the Constitution's effects on the division of powers between Member States and the EU policy-making institutions, it is necessary to understand the critical role that federalism has traditionally played in debates over the European Union since its inception. This Part chronicles the major milestones in European integration with a focus on the federalist repercussions of such developments. At the outset, the distinction between the European "Union" and the European "Community" must be noted. The Community refers to the set of supranational organizations created by the Treaty of Rome in 1957.¹⁶ The broader term of European "Union" was inaugurated in 1992 by the Maastricht Treaty and refers to the overall organization resulting from the addition of two other intergovernmental pillars to the preexisting Community pillar.¹⁷

In 1951, the European Coal and Steel Community (ECSC) was established by the joint efforts of Belgium, West Germany, Luxembourg, France, Italy, and the Netherlands.¹⁸ This supranational body wielded the power to make decisions concerning the coal and steel industries in each Member State.¹⁹ The goals of this arrangement were two-fold. First, it rendered the waging of future wars among Member States nearly impossible.²⁰ Second, it "immediately provide[d] for the setting up of common foundations for economic development as a first step in the

¹⁶ These Community institutions include the European Commission, the Council of Ministers, and the European Parliament.

¹⁷ The other two pillars refer to the development of a common foreign and security policy and cooperation on justice and home affairs. Helen Elizabeth Hartnell, *EUstitia: Institutionalizing Justice in the European Union*, 23 NW. J. INT'L L. & BUS. 65, 71-72 (2002). These profound changes in the European institutional architecture came to resemble a "Greek temple joined . . . together by a roof, the whole of which is the European Union." *Id.*

¹⁸ Donato F. Navarrete & Rosa Maria F. Egea, *The Common Foreign and Security Policy of the European Union: A Historical Perspective*, 7 COLUM. J. EUR. L. 41, 45 n.21 (2001).

¹⁹ *Id.* at 45.

²⁰ See DOUGLAS-SCOTT, *supra* note 6, at 10.

federation of Europe . . . [sic]"²¹ Regulating prices of coal and steel in the event of crises caused by shortages or over-production represented an embryonic federalism due to the removal of individual Member State control in this area.²²

The success of the ECSC spurred the same six countries to further integrate other sectors of their economies. Signed in 1957, the Treaty of Rome created the European Economic Community (EEC).²³ The EEC ushered in a common market for all goods, services, and workers while also creating a common external tariff in the form of a customs union.²⁴ The basic institutional structure responsible for creating EU law (the Council of Ministers, the Commission, a parliamentary assembly, and the European Court of Justice) was also created by the Treaty of Rome.²⁵ While the formation of the EEC acted as a significant step towards European federalism, it lacked one major economic power instrumental to a federal system—namely, the control of monetary policy and the issuing of money by a central bank.²⁶ Then, the EEC operated as a relatively centralized, homogenous decision-making entity²⁷ and was characteristic of integration along functionalist lines as an alternative to a federalist concept of integration.²⁸ In its current form, the EU maintains a significantly more diversified and fragmented system of governance resulting from

²¹ *Id.* (citing the Schuman Declaration of 1950). Robert Schuman, the French foreign minister, was credited with actualizing the ideas of a French civil servant named Jean Monnet to establish the ECSC. Monnet became the ECSC's first president.

²² *Id.* at 11.

²³ *The History of the European Union*, EUROPA: Gateway to the European Union (official web portal of the EU), at http://europa.eu.int/abc/history/index_en.htm (last visited Mar. 10, 2005). The European Atomic Energy Community (Euratom) also emerged from the Treaty of Rome and had the dual goals of establishing the basic installations necessary for the development of nuclear energy in the Community, and ensuring that all users in the Community received a regular supply of nuclear fuels. See *Euratom Supply Agency: Mission*, EUROPA: Gateway to the European Union, at http://europa.eu.int/comm/euratom/mission_en.html (last visited Mar. 10, 2005).

²⁴ For an overview of the EEC, see Jan Corbet, *The Law of the EEC and Intellectual Property*, 13 J.L. & COM. 327, 328 (1994). EEC law already took precedence over national law in 1964 through a ruling by the European Court of Justice. *Id.* at 330.

²⁵ Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1623–24 (2002).

²⁶ DOUGLAS-SCOTT, *supra* note 6, at 13.

²⁷ GRÁINNE DE BÚRCA & JOANNE SCOTT, *CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY I* (Gráinne de Búrca & Joanne Scott eds., 2000).

²⁸ DOUGLAS-SCOTT, *supra* note 6, at 13.

geographical expansion²⁹ and wider policy competence.³⁰ This movement toward expanded policy competence began in 1967 when the ECSC, the EEC, and Euratom merged into a single European Commission.³¹ From that point on, the Commission co-existed with the Council of Ministers and European Parliament.³² The progress of European integration, from the late 1960s on, began to be explained by intergovernmentalism rather than the earlier functionalism.³³ With its introduction of new forms of cooperation between Member States, the Maastricht Treaty of 1992 represented a watershed moment for Europe.³⁴ The addition of two new intergovernmental pillars (foreign and security policy and justice and home affairs) to the existing "Community" system resulted in the creation of the European "Union."³⁵ The major new substantive provisions of the Maastricht Treaty included a timetable for implementation of a monetary union.³⁶ In conjunction with this timetable, provisions concerning an exchange rate mechanism, common currency (the euro), and a European Central Bank were introduced.³⁷ Allaying Member States' fears of losing sovereignty, the Maastricht Treaty introduced the principle of subsidiarity.³⁸ Pursuant to this principle, the EU may only take action when the objectives of a proposed action "cannot be sufficiently achieved by Member States, and can therefore,

²⁹ Membership in the European communities expanded from six to ten in 1972 with the accession of Denmark, the United Kingdom, Ireland, and Norway. *See The History of the European Union*, *supra* note 23. In 1981, Greece joined. *See id.* Spain and Portugal joined in 1986. The next wave of expansion occurred in 1995 with the accession of Austria, Finland, and Sweden. *Id.*

³⁰ DE BÚRCA AND SCOTT, *supra* note 27, at 1.

³¹ *The History of the European Union*, *supra* note 23.

³² *Id.* The functions of each of these major European institutions will be analyzed in depth in Part III.C.

³³ Armin von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, 6 COLUM. J. EUR. L. 27, 52 (2000) (noting that the primarily functional approach of the EEC-Treaty has ultimately lead towards a federal structure).

³⁴ *The History of the European Union*, *supra* note 23.

³⁵ *See* Young, *supra* note 25, at 1624.

³⁶ Flora Goudappel, *The Influence of European Monetary Integration on the Internal European Relationships*, 14 TUL. EUR. & CIV. L.F. 101, 105 (1999).

³⁷ *Id.* at 105–06. From 1999 on, the euro began to be used in Member State banks. *Id.* at 101. Since 2002, the euro has been the official currency of twelve Member States. *History of the Euro*, BBC NEWS ONLINE (June 9, 2003), at http://news.bbc.co.uk/1/hi/uk_politics/2450825.stm.

³⁸ Henkel, *supra* note 12, at 361.

by reason of the scale or effects of the proposed action, be better achieved by the Community.”³⁹

Many still saw the attempts to consolidate, redefine, or “constitutionalize” preexisting treaties at Maastricht unsuccessful because there was no express division of powers in the sense that one would find in a federal context.⁴⁰ The indeterminacy engendered by Maastricht relating to the division of powers in the EU acted as a precursor to the Nice Summit held in 2000.⁴¹ In Nice, European heads of state reached an agreement to revise pre-existing EU treaties in preparation for enlargement in 2004.⁴² One year later, on December 15, 2001, at a meeting in Laeken, Holland, they adopted the Declaration on the Future of the European Union and prescribed the formation of a European Convention to draft a constitution.⁴³

Meeting from February 2002 to July 2003, the Convention was chaired by former French President Valéry Giscard d’Estaing.⁴⁴ The members of the Convention included Giscard d’Estaing serving as its President, two Vice Presidents (Giuliano Amato and Jean-Luc Dehaene, the former Prime Ministers of Italy and Belgium, respectively), twenty-eight governmental representatives from the Member States and candidate countries, fifty-six delegates from the national parliaments of the Member States and candidate countries, sixteen members of the European Parliament, and two

³⁹ CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY [hereinafter EC TREATY], Dec. 24, 2002, art. 5, O.J. (C 325) 33 (2002), http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html (last visited Mar. 10, 2005).

⁴⁰ DOUGLAS-SCOTT, *supra* note 6, at 31, 156.

⁴¹ The Treaty of Nice was signed by all Member States in 2001 and came into force in 2003. *The History of the European Union*, *supra* note 23. In addition to its attempts at clarifying the indeterminacy engendered by the Maastricht Treaty, it also attempted to prepare EU institutions for the accession of ten new Member States in 2004. *See EU Strikes Reform Deal After Marathon*, BBC NEWS ONLINE (Dec. 11, 2000), at <http://news.bbc.co.uk/1/hi/world/europe/1065192.stm>.

⁴² Treaty of Nice, Feb. 26, 2001, Decl. 23(5), O.J. (C 80) 1 (2001), http://europa.eu.int/eur-lex/en/treaties/dat/nice_treaty_en.pdf (last visited Mar. 10, 2005). This Declaration sought to settle questions of how to “establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity.” *Id.* Other pertinent topics included the goal of simplifying pre-existing Treaties and better defining the role of national parliaments in the European architecture. *Id.*

⁴³ *The Future of the European Union: The History of the Draft Constitution*, EUROPA: Gateway to the European Union, at http://europa.eu.int/futurum/treaty_history_en.htm (last visited Mar. 10, 2005).

⁴⁴ Puder, *supra* note 2, at 1562.

representatives from the European Commission.⁴⁵ The course of deliberations was organized into monthly plenary sessions open to the public, and various working groups formed to examine issues more closely.⁴⁶ In order to dispel the notion that the EU is inaccessible to ordinary European citizens, the Convention's proceedings were marked by their transparency.⁴⁷ On May 26, 2003, the fifteen month-long process came to fruition with the unveiling of a draft constitution that EU heads of state adopted on June 18, 2004.⁴⁸ The final step in the EU's constitutional journey will be for the citizens of certain Member States to vote on the Constitution in a referendum.⁴⁹ Voters in Spain, despite a relatively low turnout, have already approved the Constitution with a healthy majority.⁵⁰

III. THE FEDERALIST IMPLICATIONS OF THE EU CONSTITUTION ON THE EUROPEAN COMMUNITY INSTITUTIONS

The institutions responsible for creating EU legislation include the European Commission, the Council of Ministers, the European Parliament, the European Council, and the European Court of Justice. This Part examines the current distribution of power between these institutions and national governments, and then discusses the implications of the Constitution on this division of power. Before discussing the institutions, this Part will address the complementary concepts of the legal supremacy of EU law and the principle of subsidiarity, and how the Constitution affects them. These concepts are intertwined with the role of the European Community institutions in creating EU legislation, while not unduly infringing on Member State sovereignty. The Constitution's establishment of an EU legal

⁴⁵ *Id.* at 1574. In addition, thirteen observer invitees were present and represented two advisory Committee bodies including the Economic and Social Committee, the Committee of Regions, the social partners, and the European Ombudsman. *Id.* at 1575.

⁴⁶ *Id.* at 1575-76.

⁴⁷ For example, in the summer of 2002, a three-day European Youth Convention united 210 young people age eighteen to twenty-five, to discuss the future of Europe. *Id.* at 1575. In addition, the European Convention Forum operated as a means for interested individuals to take part in the debate. *Id.*

⁴⁸ Reynolds, *supra* note 1.

⁴⁹ For a list of the countries that plan to hold a referendum, see *EU Constitution: Where Member States Stand*, BBC NEWS ONLINE (Mar. 7, 2005), at <http://news.bbc.co.uk/1/hi/world/europe/3954327.stm>. The national legislatures of Hungary, Lithuania, and Slovenia have already approved the Constitution and will not hold referendums. *Id.*

⁵⁰ Seventy-seven percent of voters approved the Constitution. *Spain voters approve EU Charter*, BBC NEWS ONLINE (February 20, 2005), at <http://news.bbc.co.uk/1/hi/world/europe/4280841.stm>.

personality will also be discussed due to its federalist repercussions on the Community institutions.

A. The EU Constitution and the Interaction between the Concepts of Supremacy and Subsidiarity.

If the foundational concept of the supremacy of EU law over national laws did not exist, none of the EU policy-making institutions' actions could be enforced and the EU would consequently grind to a halt.⁵¹ The concept of the legal supremacy of EU law is exemplified in the following passage from a European Court of Justice decision:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity of Community law. The validity of such measures can only be judged in light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature by overridden by rules of national law⁵²

While the concept of the legal supremacy of EU law has long been in force in the form of judicial decree,⁵³ the EU Constitution actually codifies it.⁵⁴ Inclusion of this provision, even though it has effectively existed for decades, has added fuel to the fire of many "Euroskeptics" who feel threatened by an ever more centralized EU lawmaking apparatus.⁵⁵

Despite the legal supremacy of EU law, Member States remain an indispensable source of legitimization for Community authority and "must

⁵¹ *Tidying Up or Tyranny?*, *supra* note 3.

⁵² Case 11/70, *Internationale Handelsgesellschaft gmbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, *available at* http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=E N&numdoc=61970J0011&model=guichett. See also Case 26/62, *NV Algemene Transport en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 (stating that "[t]he Community constitutes a new legal order for the benefit of which the states have limited sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals"), *available at* http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=E N&numdoc=61962J0026&model=guichett.

⁵³ *Tidying Up or Tyranny?*, *supra* note 3.

⁵⁴ Constitution for Europe, *supra* note 14, art. I-5(1).

⁵⁵ *Tidying Up or Tyranny?*, *supra* note 3. When asked, only ten percent of Britons accept the proposition that EU law should override British law. *Id.*

retain sufficient competences and areas of responsibility.”⁵⁶ The principle of subsidiarity acts as a check on the concept of supremacy, and can be described as a structural principle that regulates the distribution of powers between the Community and the Member States.⁵⁷ More specifically, the principle of subsidiarity establishes that the “Community shall take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”⁵⁸ Federalism presupposes and follows subsidiarity.⁵⁹ That is, Member States could not justify devolving power to a supranational institution without retaining the right to block actions that they feel upset the federalist balance orchestrated between the EU and its members.

The Constitution resolves the competing needs of maintaining a viable federal system while granting Member States the necessary power to thwart measures they deem to encroach upon their sovereignty. First, the principal of subsidiarity is restated in Article I-11(3), as is the corollary principle of proportionality under which “Union action shall not exceed what is necessary to accomplish the objectives of the Constitution.”⁶⁰ Furthermore, under the Constitution, the Commission, the European Parliament, and the Council of Ministers, are required to send all legislative proposals to national parliaments in advance.⁶¹ The Commission is required to consult thoroughly before making any proposals and must take into account the regional or local dimension of the proposed action.⁶² All drafts of legislative acts must include reasons why the objectives of the acts can be better achieved at the Union level.⁶³ National parliaments may send, within six weeks of a legislative proposal, a reasoned opinion on whether the legislation complies with the subsidiarity principle.⁶⁴ At this point, the body from which the legislative act

⁵⁶ Udo Di Fabio, *A European Charter: Towards a Constitution for the Union*, 7 COLUM. J. EUR. L. 159, 170 (2001).

⁵⁷ Henkel, *supra* note 12, at 362.

⁵⁸ EC TREATY art. 5.

⁵⁹ Henkel, *supra* note 12, at 363.

⁶⁰ Constitution for Europe, *supra* note 14, art. I-11(3), art. I-11(4).

⁶¹ *Id.* at art. I-18(3). This procedure is known as the flexibility clause.

⁶² Constitution for Europe: Protocol on the Application of Principles of Subsidiarity and Proportionality [hereinafter Protocol on the Application of Principles of Subsidiarity and Proportionality], Aug. 6, 2004, art. 2, <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf> (last visited Mar. 10, 2005).

⁶³ *Id.* at art. 5. The financial and administrative burdens to be imposed on affected national governments must also be taken into account. *Id.*

⁶⁴ *Id.* at art. 6.

originates shall take into account the reasoned opinion of the national parliament.⁶⁵

If a third of national parliaments feel that a proposed EU law exceeds the Union's powers, the law must be reviewed.⁶⁶ Then, the Commission, or any other body from which the legislation originates, may decide to maintain, amend, or withdraw the draft and must provide reasons for its ultimate decision.⁶⁷ The Court of Justice also has jurisdiction on the basis of infringements of the principle of subsidiarity.⁶⁸

While Member States cannot necessarily block a law, these provisions serve to offset the expanded use of majority voting and correspondingly increase the power of individual Member States. Even if a law cannot be stopped after it is passed by the Commission, the Council of Ministers and European Parliament must still adopt it in order for it to enter into force.⁶⁹ In this sense, the EU lawmaking process works similarly to the American one,⁷⁰ insofar as a bill must be approved by a Committee before passage in Congress and subsequent presidential approval.

Critics of the Constitution have argued that its subsidiarity provisions should actually be toughened. One proposal would be to make the Commission withdraw any proposal which three or more national parliaments deem in breach of subsidiarity.⁷¹ Nevertheless, in a Union of twenty-five Member States, the collective efforts of a majority could be too often thwarted by only three countries. The current compromise of a third of Member States needing to voice disapproval will result in more efficient decision-making without significantly intruding on Member State sovereignty, and will ensure that "Member State-mediated sources of legitimization do not threaten to become tangled in interwoven networks of power."⁷²

⁶⁵ *Id.* at art. 7. Such legislative bodies may include the European Commission, the European Parliament, the Council of Ministers, and, where appropriate, the Court of Justice, the European Central Bank, or a group of Member States. *Id.*

⁶⁶ *Id.* at art. 7.

⁶⁷ *Id.*

⁶⁸ Protocol on the Application of Principles of Subsidiarity and Proportionality, *supra* note 62, at art. 8. Actions brought before the Court must be in accordance with Article III-365 of the Constitution. *Id.*

⁶⁹ See *infra* Parts III.C.2 and III.C.3.

⁷⁰ WILLIAM N. ESKRIDGE ET. AL, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 25 (3d. ed. 2001).

⁷¹ *Roman Carnival*, *ECONOMIST*, Oct. 4, 2003, at 16.

⁷² Di Fabio, *supra* note 56, at 170.

B. *The EU Constitution's Proposal for an EU Legal Personality*

The implementation of an EU legal personality is also intertwined with the ability of the EU institutions to promulgate laws and thereby affects the nature of federalism in the EU. As it currently stands, the EU governing treaties contain some of the legal elements to distinguish the Union from the individual Member States.⁷³ Nevertheless, they do not grant the EU a legal personality and do not confer on the EU treaty-making powers.⁷⁴ The concept of legal personality differs depending on the context in which it is used. On a national level, individuals, corporations, towns, churches, and states are all viewed in the eyes of the law as legal personalities bestowed with specific powers.⁷⁵ On an international plane, however, more restrictions exist than in national societies with respect to recognizing the legal personality of international organizations, as states generally control whether international organizations may possess such a legal personality.⁷⁶ In the *Reparation for Injuries*⁷⁷ case, the International Court of Justice found that a UN organization may have legal personality even without an express provision conferring personality.⁷⁸ The Court set out three main requisites for legal personality: (1) legal personality must be indispensable to the achievement of the organization's objectives; (2) the organization must have its own organs and special tasks; and (3) the organization itself must be distinct from its member states.⁷⁹ Even though the EU seemingly satisfies criteria (2) and (3), the consensus among Member States has generally been that legal personality is not indispensable to the performance of the EU's functions.⁸⁰

Despite the fact that legal personality may not be indispensable, the Constitution confers on the EU a legal personality.⁸¹ This provision would

⁷³ Esa Paasivirta, *The European Union: From an Aggregate of States to a Legal Person?*, 2 HOFSTRA L. & POL'Y SYMP. 37, 54 (1997).

⁷⁴ See Puder, *supra* note 2, at 1581. At present, the European Communities, as opposed to the EU, are endowed with a legal personality. *Id.*

⁷⁵ Paasivirta, *supra* note 73, at 40.

⁷⁶ *Id.* at 41. Given that the ability to bestow legal personality on non-state actors is reserved to states, the attainment of international legal personality is usually accomplished through the treaty establishing the organization. *Id.* at 41-42.

⁷⁷ *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178-79 (Apr. 11).

⁷⁸ Paasivirta, *supra* note 73, at 44.

⁷⁹ *Id.*

⁸⁰ *Id.* at 52-53. The German Federal Constitutional Court has held that the EU does not possess a legal personality. *Id.* at 53. (citing German Federal Constitutional Court Judgment on the Maastricht Treaty of Oct. 12, 1993, 33 I.L.M. 388, 428-29 (1994)).

⁸¹ Constitution for Europe, *supra* note 14, at art. I-7.

allow the EU to sign, for example, a trade agreement on behalf of all Member States instead of having each of the Member States sign separately.⁸² Theoretically, the EU could also take a seat at the UN,⁸³ take a case to the International Court of Justice, or be the subject of a suit in the ICJ.⁸⁴

Critics of the proposal are wary of granting the EU competency to act on behalf of all twenty-five Member States.⁸⁵ Nevertheless, granting the EU a legal personality would arguably make Europe a larger actor on the international scene and spur greater transparency and identity building.⁸⁶ Considering that the three pillars have merged, the emergence of a legal personality is a natural progression. While the federalist balance may swing toward greater supranational control, the ability of the EU to act as a single unit is essential to exerting its influence on the global stage economically, socially, and militarily. In any event, the long-term impact of the establishment of an EU legal personality will be contingent on all Member States actually agreeing to a unified policy on the international stage—certainly not a foregone conclusion.

C. The European Community Policymaking Institutions and the Constitution

This Part examines the current roles of the European Commission, the Council of Ministers, the European Parliament, the European Council, and the European Court of Justice in the EU law-making process and then addresses how the Constitution's changes impact federalism in the EU.

⁸² Paul Reynolds, *Analysis: More of the same EU?*, BBC NEWS ONLINE (May 28, 2003), available at <http://news.bbc.co.uk/1/hi/world/europe/2940800.stm>.

⁸³ *Id.*

⁸⁴ Honor Mahony, *Convention Delegates Welcome EU Legal Personality*, EUOBSERVER, Oct. 4, 2002, at <http://www.euobserver.com/index.phtml?aid=7788> (discussing how members of the European Convention on drafting a constitution for Europe arrived at a general consensus on a single legal personality for the EU). Delegates agreed that granting the EU legal personality would serve to simplify the Treaties and simplify the Union for its citizens. *Id.*

⁸⁵ *Id.* Valéry Giscard d'Estaing, the Chairman of the Convention, dispelled these worries, however, on the grounds that a constitution could function as "a single document which would deal with all the institutions," allowing for the "same system" with "different procedures." *Id.* He added that "specific arrangements around CFSP might be retained." *Id.*

⁸⁶ Puder, *supra* note 2, at 1583.

1. *The European Commission*

Traditionally described as the most supranational of the EU institutions, the European Commission⁸⁷ is most similar to the administrative agencies of the American executive branch.⁸⁸ However, the Commission wields more extensive powers than an administrative agency insofar as it has the sole responsibility for implementing the principles enshrined in the EU treaties into actual laws and regulations.⁸⁹ The Council of Ministers and the European Parliament can only pass legislation drafted by the Commission.⁹⁰ The Parliament can, in the furtherance of implementing the Treaties, request the Commission to submit proposals to that end.⁹¹ Once a proposal has been presented to the Council and the Parliament, the three institutions work together to reach a satisfactory result.⁹² The Commission also ensures that EU legislation is applied correctly by the Member States through legally binding decisions and the power to bring states that fail to fulfill their obligations before the European Court of Justice.⁹³

⁸⁷ Headquartered in Brussels, the European Commission is a college of twenty Commissioners who are appointed by the Council of Ministers for five year terms. EC TREATY arts. 213–14. The Commissioners are supposed to be representative of the European people, but this does not seem to be the case according to a study concluding that Commissioners were predominantly male and late middle-aged with centrist political affiliations. DOUGLAS-SCOTT, *supra* note 6, at 57 (citing Andrew MacMullen, *European Commissioners: National Routes to a European Elite*, in AT THE HEART OF THE UNION: STUDIES OF THE EUROPEAN COMMISSION 48–50 (Nugent ed. 2000)).

⁸⁸ Young, *supra* note 25, at 1628. Other commentators have described the Commission as resembling “a Government in the usual European sense of the term” that “performs tasks commonly identified with the executive.” *Id.* at 1628 n.67 (quoting GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 42 (2d ed. 2002)). Among the Commission’s executive functions include managing the EU budget and negotiating trade and cooperation agreements on behalf of the EU such as the Uruguay Round leading to the creation of the WTO. DOUGLAS-SCOTT, *supra* note 6, at 69.

⁸⁹ Young, *supra* note 25, at 1628. The Commission has the sole power to initiate legislation. *Id.*; see also EC TREATY art. 211.

⁹⁰ JOHN A. USHER, EC INSTITUTIONS AND LEGISLATION 34, 64 (1998).

⁹¹ EC TREATY art. 192. Legislative proposals may be divided into two categories: regulations, which are self-executing and bind both public and private actors; and directives, which bind the Member States in terms of their goals and objectives but leave implementation up to the Member States. Young, *supra* note 25, at 1628–29.

⁹² Legislative proposals must be approved by the Council of Ministers and may be blocked by the European Parliament. Young, *supra* note 25, at 1628. In certain areas like the implementation of the Common Agricultural Policy, however, the Parliament need not be consulted. USHER, *supra* note 90, at 40.

⁹³ John Temple Lang, *The Commission: The Key to the Constitutional Treaty for Europe*, 26 FORDHAM INT’L L.J. 1598, 1599 (2003).

Under the principle of subsidiarity, the Commission may act only in areas where Community-level action would be more effective than action taken at a national, regional, or local level.⁹⁴ Despite this principle of subsidiarity, many view the Commission as being democratically deficient and possessing a structure that does not protect Member State autonomy enough.⁹⁵ This belief stems mainly from the fact that the Commission “does not even purport to act in the interests of the States” and that “Commissioners are in fact expressly barred by the Treaty from doing so.”⁹⁶ Qualified majority voting (as opposed to unanimous voting) in the Council of Ministers has further enhanced the Commission’s autonomy since its rulemaking authority became “[free] from the requirement of formal approbation by the democratically-accountable executives in each Member State.”⁹⁷ Nevertheless, the Commission, as a representative, independent, policy-making entity, is “becoming better understood and more widely approved.”⁹⁸

In the hopes of avoiding an overly large Commission in the wake of enlargement to twenty-five Member States, and possibly thirty in the near future,⁹⁹ the Constitution provides that the Commission shall be composed of a number of members, including the President and the Union Minister of Foreign Affairs, equal to two-thirds of the number of Member States, unless the European Council unanimously decides to alter this figure.¹⁰⁰ However, Member States will be treated on “strictly equal footing” regarding the determination of the sequence and the time spent by their nationals as Members of the College.¹⁰¹ Consequently, “the difference between the total

⁹⁴ EC TREATY art. 5; see also USHER, *supra* note 90, at 89–91.

⁹⁵ See Young, *supra* note 25, at 1694 (noting that “[j]ust as the American states are not directly represented in the structure of federal administrative bureaucracies, the Commission’s structure likewise includes little in way of built-in protections for Member State autonomy.”).

⁹⁶ George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 398 (1994) (referring to EC TREATY art. 157). Commissioners also may not be removed by the home government during their term. *Id.* (quoting JOHN MCCORMICK, *THE EUROPEAN UNION: POLITICS AND POLICIES* 102 (1999)).

⁹⁷ Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 667 (1999).

⁹⁸ Lang, *supra* note 93, at 1600.

⁹⁹ See *supra* note 5 and accompanying text.

¹⁰⁰ Constitution for Europe, *supra* note 14, at art. I-26(6). This scheme will only begin in 2009—a transitional measure allaying the fear of small states that they will be ignored. *What the EU Constitution says*, *supra* note 13.

¹⁰¹ Constitution for Europe, *supra* note 14, at art. I-26(6)(a).

number of terms of office held by nationals of any given pair of Member States may never be more than one.”¹⁰²

This plan has drawn criticism due to the reduction in the number of voting commissioners.¹⁰³ Despite the valid concerns over not being represented on the Commission, the change is necessary to ensure an efficiently functioning institution.¹⁰⁴ Furthermore, it must be remembered that the Commission is supposed to work for European, not national interests—unlike the Council of Ministers which prioritizes Member State interests.¹⁰⁵ Provided that the Commission continues to work for the good of Europe as a whole,¹⁰⁶ the fact that certain Member States will not have voting power in the Commission does not necessarily result in a threat to their sovereignty. In analyzing the impact of this provision, it must also be remembered that the Constitution’s subsidiarity provisions¹⁰⁷ and the accompanying protocol on the principal of subsidiarity¹⁰⁸ will prevent the Commission from trampling on the interests of Member States who do not have a commissioner.

2. The Council of Ministers

The Council of Ministers¹⁰⁹ acts as the main legislative institution of the EU.¹¹⁰ Located in Brussels and Luxembourg, the Council is comprised of one ministerial-level representative of each Member State who is empowered

¹⁰² *Id.*

¹⁰³ Smaller European countries have met in Prague to voice their displeasure at the possibility of not having a voting commissioner. *A Little Bit of Editing—Or Will It End Up in the Bin?*, ECONOMIST, Oct. 4, 2003, at 47.

¹⁰⁴ A thirty member Commission carries the risk of being too unwieldy, wasteful and weak. *Id.*

¹⁰⁵ See *infra* notes 114–20 and accompanying text.

¹⁰⁶ The constitution reaffirms this guiding principle. See Constitution for Europe, *supra* note 14, at art. 26(1).

¹⁰⁷ See *id.* at art. I-11(3), art. I-11(4).

¹⁰⁸ See *supra* notes 58–65 and accompanying text.

¹⁰⁹ In 1965, the Council was established in conjunction with a treaty that merged the European Economic Community, the European Coal and Steel Community, and the European Atomic Energy Community. *Milestones of Europe*, BBC NEWS ONLINE, at http://news.bbc.co.uk/hi/english/static/in_depth/europe/2001/inside_europe/milestones/1965.stm (last visited Mar. 10, 2005).

¹¹⁰ Paola Michelle Koo, Note, *The Struggle for Democratic Legitimacy within the European Union*, 19 B.U. INT’L. L.J. 111, 115 (2001). The prominence of the Council in EU decision-making raises the issue of what is known as “executive dominance.” *Id.* at 113. That is, even though the powers of the European Parliament have been increased over the years, the Council of Ministers remains at the heart of European decision-making. *Id.* at 114.

to bind his or her government.¹¹¹ The Presidency of the Council rotates among Member States every six months.¹¹² The President sets the agenda for the six-month period—leadership that can be significant for a Member State's image and national pride.¹¹³

The Council (1) "ensure[s] coordination of the general economic policies of the Member States,"¹¹⁴ (2) wields the power to make decisions,¹¹⁵ and (3) confers on the Commission the power to implement the acts it adopts as law.¹¹⁶ The Council of Ministers has traditionally been the primary institutional guarantor of Member State autonomy in the EU.¹¹⁷ Unlike the Commission, its members are not called upon to advance the greater good of the EU as an institution.¹¹⁸ Rather, ministers are called upon to "look after the State's interests in the matter before the Council and to cast a vote accordingly."¹¹⁹ While this prevents major inroads into Member State autonomy, certain long-term regulatory interests of Member States may be frustrated as ministers, when faced with a policy favorable to their country, choose to pursue such interests at an EU level when the action could be taken at the national level.¹²⁰

Given the extensive power of the Council to enact laws, set economic policies, and appoint commissioners, the relative power of each Member State to influence such important decisions has come to the forefront in the context of the debate over voting weights in the Council. The compromise reached at the Nice Summit in 2000 resulted in a system that gives extra votes to medium-sized countries such as Spain and Poland. For example, Germany with a population of over eighty million and the United Kingdom

¹¹¹ EC TREATY art. 203. "[T]he Council actually consists of several different councils, depending on the topic under discussion." Young, *supra* note 25, at 1626. Thus, foreign ministers may meet to discuss foreign affairs, while transport ministers may meet to discuss transport policy. *Id.*

¹¹² EC TREATY art. 203. The Presidency is currently held by Luxembourg.

¹¹³ DOUGLAS-SCOTT, *supra* note 6, at 75. However, the considerable task of leading the EU is often difficult for small countries without great resources at hand. *Id.*

¹¹⁴ EC TREATY art. 202.

¹¹⁵ *Id.* The Council only acts on proposals from the Commission and generally works in concert with the European Parliament for most important legislation. *See id.* The Council also influences other EU institutions and bodies. For example, the Council elects members of the Commission and can also alter members of the Commission. *See id.* at art. 214(2), art. 213(1), respectively.

¹¹⁶ *Id.* at art. 202.

¹¹⁷ Young, *supra* note 25, at 1689.

¹¹⁸ *Id.* at 1689–90.

¹¹⁹ Bermann, *supra* note 96, at 395.

¹²⁰ Young, *supra* note 25, at 1691.

with a population of over sixty million receive twenty-nine votes each.¹²¹ However, Spain and Poland, with populations of approximately forty million, receive twenty-seven votes.¹²² Under the Nice Treaty, a decision is adopted when (1) 258 out of 345 (75%) of the votes are in favor of a proposal and (2) a majority of the twenty-five Member States favors the proposal.¹²³ This system is known as qualified majority voting (QMV).

Under the Nice system, the power of a country with a larger population like Germany is limited in a manner disproportionate to its population.¹²⁴ Medium-sized countries like Spain and Poland would benefit from the aspect of QMV that gives them a disproportionate share of the actual votes needed to reach the 75% threshold. Smaller countries also stand to gain under the Nice system because they far outnumber larger Member States and can block legislation purportedly advancing the interests of larger countries by virtue of the requirement that a majority of all Member States vote for a particular proposal.¹²⁵

In opposition to the Nice system, the EU Constitution contemplates a QMV system effectuated by a "double majority" structure.¹²⁶ Under this structure, two elements are necessary for an EU law to pass. First, 55 percent of the members—at least fifteen—must vote in favor of a proposal.¹²⁷ Second, the countries in the majority must represent at least 65% of the EU population.¹²⁸ Furthermore, "[a] blocking minority must include at least four [Member States], failing which the qualified majority shall be deemed attained."¹²⁹ However, "when the Council is not acting on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority shall be defined as at least 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union."¹³⁰

Double majority voting would work to the advantage of larger Member States like Germany and the United Kingdom as their voting weights would be measured according to their population. Smaller countries would retain

¹²¹ Treaty of Nice, *supra* note 42, at decl. 20.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Might it all tumble down?*, *ECONOMIST*, December 13, 2003, at 45. Germany only has 9.2% of the voting power under the Nice system. *Id.*

¹²⁵ Currently, eighteen of the twenty-five Member States have populations under 16 million.

¹²⁶ *Might it all tumble down?*, *supra* note 124.

¹²⁷ Constitution for Europe, *supra* note 14, art. I-25(1).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at art. I-25(2).

much the same power they wielded under the Nice plan given the continued requirement for a majority of all Member States to adopt a proposal. Spain and Poland, as medium-sized countries, stand to lose the most since their voting weight will be predicated on their population, and not the disproportionate allocation of votes adopted in Nice. However, these countries can still be in a position of power if, for example, three large Member States want to block a measure and need another larger Member State to form a four country blocking minority.

The new voting weight system introduced by the Constitution succeeds in both giving a voice to all countries in the Union, and facilitating a more efficient Council of Ministers. Countries with smaller populations, just as American states with smaller populations in the U.S. Senate, possess a power disproportionate to their size.¹³¹ But in drafting a constitution for twenty-five different countries with widely divergent cultures, it is necessary to ensure that each of them feel as though they have a say in the everyday functioning of the EU.¹³²

The Constitution also contemplates increased use of qualified majority voting to prevent deadlock in the future. Currently, QMV is used only in votes on certain policy areas like the internal market. The "Luxembourg Compromise," under which a country could block agreement by declaring a vital national interest, allows Member States to block legislation in sensitive areas touching upon internal affairs such as farm policy and border control.¹³³ Under the Constitution, QMV would be used across the board unless otherwise stated.¹³⁴

This presents a concern for those wishing for an EU with more limited powers. While the Constitution will undoubtedly shift power away from individual Member States, it is clear that changes needed to be made. Even in an EU of fifteen, the ability of individual Member States to veto legislation hampers the EU's lawmaking ability. Indeed, without the use of QMV for the

¹³¹ U.S. CONST. art. I, § 3 ("The Senate of the United States shall be composed of two Senators from each State . . .").

¹³² This is consistent with the view held by leading commentators Joseph Weiler and Neil MacCormick who advocate "neither the creation of a new European state nor a retreat to the nation-state." Pavlos Eleftheriadis, *The European Constitution and Cosmopolitan Ideas*, 7 COLUM. J. EUR. L. 21, 28 (2001).

¹³³ Joel P. Trachtman, Symposium, *Institutions for International Economic Integration*, 17 NW. J. INT'L L. & BUS. 470, 546 (1996-97) (Noting that the "Luxembourg Compromise" [reflected] the French view that a member state could invoke 'vital national interests' as a basis for declining" to vote by majority). The term "vital national interests," therefore, came to be defined by the dissenting state. *Id.*

¹³⁴ Constitution for Europe, *supra* note 14, art. I-25(3). Justice and home affairs is one notable area that traditionally has retained national veto rights, but would now be subject to increased QMV. *What the EU constitution says*, *supra* note 13.

EU's economic policy,¹³⁵ the euro and the European Central Bank may never have come to fruition and the EU would not be as competitive on the global economic stage.

On the whole, the Constitution's provisions allowing for a simpler and more proportionate voting system as well as an increased use of qualified majority voting will result in a more dynamic EU by lessening the possibility of deadlock.

3. *The European Parliament*

Interestingly, the European Parliament¹³⁶ is the only directly-elected international institution in the world.¹³⁷ It acts as the main representative of European citizens within the EU.¹³⁸ The European Parliament's roles include: (1) the sharing of legislative power with the Council of Ministers in a process known as co-decision,¹³⁹ (2) democratic supervision of the executive,¹⁴⁰ and (3) adoption of an annual budget.¹⁴¹ Over the last fifteen

¹³⁵ EC TREATY art. 99(2) ("The Council shall, acting by a qualified majority on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Community . . .").

¹³⁶ The Parliament currently has 732 members (MEP's) who are elected every five years. *European Union Institutions and Other Bodies: The European Parliament*, EUROPA: Gateway to the European Union, at http://europa.eu.int/institutions/parliament/index_en.htm (last visited Mar. 10, 2005).

¹³⁷ USHER, *supra* note 90, at 60.

¹³⁸ The European Parliament was first elected by universal suffrage by European citizens in 1979. *European Union Institutions and Other Bodies: The European Parliament*, *supra* note 136.

¹³⁹ The Parliament and the Council engage in a process known as co-decision. EC TREATY art. 251(2). Co-decision places the two bodies on equal footing and leads to the adoption of joint acts. Young, *supra* note 25, at 1697. In the event of disagreement, the ministers and an equal number of Members of Parliament form a Conciliation Committee. If there is a qualified majority of the ministers and a majority of the Members of Parliament, then the legislation passes. *Id.* Parliamentary approval is required for significant political and institutional questions like accession of new Member States and signing international agreements. See Hans-Joachim Glaesner, *Formulation of Objectives and Decision-Making Procedure in the European Union*, 18 FORDHAM INT'L L.J. 765, 772-74 (1995).

¹⁴⁰ This role includes the ability to pass a "motion of censure" calling for the resignation of the Commission. EC TREATY art. 201. The Parliament also monitors the Commission through regular written and oral questions. *Id.* at art. 197. It also has the power to set up Committees of Inquiry to investigate "alleged contraventions or maladministration in the implementation of Community law." *Id.* at art.193. In 1997, the Parliament set up such a Committee to investigate the mad cow disease crisis and to compel the Commission to change its policy. DOUGLAS-SCOTT, *supra* note 6, at 93.

years, the Parliament has become more like a traditional legislative body, rather than a consultative assembly as originally planned.¹⁴² The Parliament thus provides an important counterweight to the Council in the legislative process, as its decision-making tends to be more independent than the sometimes short-term decisions of government ministers.¹⁴³ In order to remedy the concerns about a “democratic deficit” in the Commission and the Council of Ministers—concerns to a large extent addressed by the Constitution—there have been calls to enhance the role of the Parliament.¹⁴⁴

Under the Constitution, the European Parliament stands to gain a more prominent role in the EU decision-making process. As discussed earlier, the European Parliament enjoys the right to co-decision along with the Council of Ministers.¹⁴⁵ This traditional function is codified in the Constitution in Article I-23(1).¹⁴⁶ The Constitution “extends the number of areas in which the European Parliament can fully legislate from 34 to 70.”¹⁴⁷ However, the Parliament does not enjoy the right of co-decision in setting the EU’s long-range budget plans in areas such as the Common Agricultural Policy, which consumes almost half of the EU’s budget.¹⁴⁸

In addition to raising the number of members of the European Parliament to 750,¹⁴⁹ the Constitution also aims to make the Parliament more

¹⁴¹ DOUGLAS-SCOTT, *supra* note 6, at 89. After the Commission prepares a preliminary draft budget subject to Council approval, the Parliament is given the opportunity to negotiate with the Council to amend certain items of expenditure and ensure that budgetary resources are allocated appropriately. *European Union Institutions and Other Bodies: The European Parliament*, *supra* note 136. Once the budget is implemented upon signature by the President of Parliament, the Parliament’s Committee on Budgetary Control monitors implementation. *Id.*

¹⁴² DOUGLAS-SCOTT, *supra* note 6, at 85.

¹⁴³ *Id.*

¹⁴⁴ Young, *supra* note 25, at 1697 (citing Lindseth, *supra* note 97, at 673). Lindseth remarks that the official strategy to combat the democratic deficit centered on the need for the European Parliament to become a legitimate and superior force in the Community system. This democratic deficit is reflected in the low voter turnouts in the European Parliament elections of 2004 and the emergence of “Euroskeptic” parties. *Apathy Blights Euro Poll*, BBC NEWS ONLINE (June 14, 2004), at <http://news.bbc.co.uk/2/hi/europe/3803919.stm>.

¹⁴⁵ See *supra* note 139.

¹⁴⁶ See Constitution for Europe, *supra* note 14, at art. I-23(1) (“The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Constitution.”). Article I-26(8) also contains a provision under which the European Commission is “responsible to the European Parliament.”

¹⁴⁷ James Graff, *What They’re Fighting About*, TIME INT’L, June 9, 2003, at 41.

¹⁴⁸ *Id.*

¹⁴⁹ Summary of the Agreement on the Constitutional Treaty, *supra* note 15.

proportional to population. Currently, it takes ten times as many votes to elect a German Member of European Parliament (MEP), as to elect one from Luxembourg.¹⁵⁰ Article I-20(2) specifies that representation should be "degressively proportional, with a minimum threshold of six members per Member State."¹⁵¹ However, "[n]o Member State shall be allocated more than ninety-six seats."¹⁵²

These changes are in keeping with the ever-growing role and legitimization of the European Parliament. Such an enhanced role corresponds with the view of those theorists who espouse a dual legitimization between Council and Parliament by elevating the Parliament to an equally powerful status.¹⁵³ Others hold that democratic legitimization results from the central role of national governments, since the supranational level was perceived as being incapable of developing a democratic legitimization.¹⁵⁴ Because the European Parliament represents the most direct link of most Europeans to the EU, it can be concluded that its legitimacy in the eyes of ordinary Europeans depends on the extent to which it is able to have an impact on the legislative process. The Constitution succeeds in increasing Parliament's role and accountability in the eyes of Europeans, without disrupting the federalist balance in the EU. Even though the Parliament plays a role in passing EU laws that trump national laws, it is still charged with acting for the common good of all members of the Union and has a direct mandate from citizens by virtue of direct elections. Furthermore, the increased spheres of influence¹⁵⁵ enjoyed by the Parliament under the Constitution will render it more accountable in the eyes of Europeans, thereby increasing its legitimacy.

4. *The European Council*

Composed of the heads of state of each country, the European Council is presided over by the Member State holding the Presidency of the Council of Ministers.¹⁵⁶ The European Council plays an important role in taking more

¹⁵⁰ *Tidying Up or Tyranny?*, *supra* note 3.

¹⁵¹ Constitution for Europe, *supra* note 14, at art. I-20(2).

¹⁵² *Id.*

¹⁵³ von Bogdandy, *supra* note 33, at 49.

¹⁵⁴ *Id.*

¹⁵⁵ See Graff, *supra* note 147.

¹⁵⁶ CONSOLIDATED VERSION OF THE TREATY ON THE EUROPEAN UNION, Dec. 24, 2002, art. 4, O.J. (C 325) 5 (2002). [hereinafter TEU] available at http://europa.eu.int/eur-lex/en/treaties/dat/EU_consol.pdf (last visited Mar. 10, 2005). Traditionally, the President has acted as a spokesperson for the Union and has launched major policy initiatives. For example, during Italian President Silvio Berlusconi's recent six months in the chair, much effort was put into promoting EU-funded infrastructure schemes. See *Berlusconi's Star-*

wide-ranging and significant policy decisions such as enlargement, the establishment of a European Monetary System, and direct elections to the European Parliament.¹⁵⁷ It also devises the strategies for the common foreign and security policy.¹⁵⁸ In addition to its role as impetus of EU institutional development, the European Council retains an important symbolic status, being that Europeans can more readily identify with their elected heads of state acting as the EU's political executive instead of the unelected Commission.¹⁵⁹ With respect to the federalist balance, the European Council's ability to guide the EU on a broader level results in greater Member State sovereignty.

The European Council's role as primary impetus for the EU's development stands to be solidified if the Constitution enters into force. Article I-21 proposes the election, by qualified majority, of a European Council President for a term of two and one-half years (with a two-term maximum).¹⁶⁰ Currently, the presidency alternates between Member States every six months.¹⁶¹ Larger countries including France, Germany and the United Kingdom favor this plan given that under the qualified majority voting system in the Council of Ministers, they have a better opportunity to have their leaders elected into that post.¹⁶² Smaller countries, by contrast, disfavor this plan because it, unlike the current rotating system, does not guarantee a chance to assume the presidency.¹⁶³ A further fear is that the new president might weaken the European Commission, the traditional friend of the smaller member states, by setting up a rival seat of power.¹⁶⁴

Crossed EU Presidency, at <http://www.dw-world.de/dw/article/0,1564,1071845,00.html>. By virtue of the Irish President Bertie Ahern's skillful diplomacy during his 2004 term, the Constitution was agreed to by European heads of state. Kevin Connolly, *Irish Republic Bathes in EU Glory*, BBC NEWS ONLINE (July 1, 2004), at <http://news.bbc.co.uk/1/hi/world/europe/3854219.stm>.

¹⁵⁷ DOUGLAS-SCOTT, *supra* note 6, at 96. The same qualified majority voting rules applying to the Council of Ministers also apply to the European Council when taking votes by qualified majority. See Constitution for Europe, *supra* note 14, at art. I-24(2).

¹⁵⁸ Elizabeth Shaver Duquette, *The European Union's Common Foreign and Security Policy: Emerging from the U.S. Shadow?*, 7 U.C. DAVIS J. INT'L L. & POL'Y 169, 174 (2001).

¹⁵⁹ DOUGLAS-SCOTT, *supra* note 6, at 97 (citing TROY JOHNSTON, THE EUROPEAN COUNCIL 1 (1994)). Others have referred to the European Council as the "EU's Board of Directors." *Id.* at 96 (citing THE EVOLUTION OF EU LAW 64 (Paul Craig and Gráinne de Búrca eds., 1998)).

¹⁶⁰ Constitution for Europe, *supra* note 14, at art. I-21(1).

¹⁶¹ TEU art. 4.

¹⁶² *What the EU constitution says*, *supra* note 13.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

While it is a legitimate concern on the part of smaller states that they may not have the opportunity to exercise the presidential functions of the European Council as often as before, they need not fear completely losing their voice on the Council. The President is still accountable to the rest of the Council, the Commission, and the Parliament and, consequently, to all Member States. The benefits of having more continuity and efficiency in the post by extending the length of the term outweigh the need for each country to be represented once.¹⁶⁵ Just as the Constitution's provision terminating the one Member State-one commissioner rule in the European Commission is meant to enhance efficiency,¹⁶⁶ so too is the Constitution's provision concerning term lengths.

5. *The European Court of Justice*

In light of the significant developments confronting the EU currently and in the future, the vital role of the European Court of Justice (ECJ)¹⁶⁷ is often overlooked, and the focus tends to shift to the policy-making institutions of the EU.¹⁶⁸ The ECJ has many capacities, acting as an administrative court, a constitutional court, and a tribunal dealing with many specialized and technical areas of law such as taxation and intellectual property.¹⁶⁹ Similar to the U.S. Supreme Court, the ECJ holds the power of ultimate judicial review over the acts of its coordinate governmental branches.¹⁷⁰ In the context of federalism, the ECJ sets boundaries on the imposition of EU law on Member States.¹⁷¹ Its rulings, like those of the U.S. Supreme Court vis-à-vis the state

¹⁶⁵ British Foreign Secretary Jack Straw argued that the new term lengths would allow the President to "oversee the delivery of the Union's strategic agenda" and "communic[ate] a sense of purpose to Europe's citizens." *A Constitution for Europe*, *ECONOMIST*, Oct. 12, 2002, at 55.

¹⁶⁶ See *supra* notes 97–101 and accompanying text.

¹⁶⁷ The ECJ consists of one judge from each Member State. EC TREATY art. 221. Judges are selected for six-year terms and must be individuals whose "independence is beyond doubt." *Id.* at art. 223. In addition, Member States must, by common accord, approve all appointments to the Court. *Id.*

¹⁶⁸ Gráinne de Búrca, *Introduction*, in *THE EUROPEAN COURT OF JUSTICE 1* (Gráinne de Búrca & J.H.H. Weiler eds. 2001). Professor de Búrca highlights how the exponential growth and expansion of the EU profoundly affects the judicial branch as well as the policy-making branches of the Union. *Id.*

¹⁶⁹ *Id.* The ECJ remains a hybrid court insofar as it acts as an appellate court reviewing decisions from the Court of First Instance, but also functions in certain areas as a court of first instance and advisory jurisdiction. *Id.*

¹⁷⁰ Young, *supra* note 25, at 1630.

¹⁷¹ *Id.* at 1631. The Court has been described as the "conscience of the peoples of Europe." Harm Schepel & Erhard Blankenburg, *Mobilizing the European Court of Justice*, in *THE EUROPEAN COURT OF JUSTICE*, *supra* note 168, at 9 (citing O. DUÉ, M.

courts, are binding on the national courts of EU Member States.¹⁷² Despite the fact that the majority of EU Member States possess civil law judicial systems, the ECJ tends to act as a common law court—a conclusion derived from the line of decisions establishing the supremacy of EU law over national law that existed apart from the text of the EU treaties.¹⁷³

No changes to the structure or sphere of competency of the ECJ resulted from the Constitution. The ECJ will continue its role of “ensur[ing] respect for the law in the interpretation and application of the Constitution.”¹⁷⁴ The requirement that each Member State have at least one judge is also restated.¹⁷⁵ In light of the fact that the European Commission no longer carries the one Member State-one commissioner structure under the Constitution,¹⁷⁶ it is notable that a similar change was not enacted for the ECJ. The reason for maintaining the status quo may be tied to the ECJ’s role as the “conscience of the peoples of Europe.”¹⁷⁷ This role is magnified after accession of ten new Member States because these new entrants must feel secure that there is an ultimate judicial authority to check the power of the EU policy-making institutions by ensuring that their sovereignty is respected.

IV. THE FEDERALIST IMPLICATIONS OF THE EU CONSTITUTION ON THE COMMON FOREIGN AND SECURITY POLICY AND JUSTICE AND HOME AFFAIRS PILLARS

As stated in the Introduction, the Constitution attempts to end the three “pillar” approach to European integration.¹⁷⁸ Despite this change, the

LUTTER & J. SCHWARZE, *LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENES COMME COUR CONSTITUTIONNELLE: TROIS OBSERVATIONS* 635 (1995)). The Court positions itself as the “embodiment of a new European *Volkgeist*, one that “emphasizes the emancipatory power of legal rationality over (national) politics and judicial process over political debate.” *Id.* at 11.

¹⁷² Young, *supra* note 25, at 1631. Typically, national courts, when confronting an issue of EU law, request a ruling from the ECJ. *Id.* at 1631 n.84. After deciding the question, the ECJ sends the case back to the national court for resolution of any remaining issues. *Id.* The ECJ ensures that Community law is interpreted and applied in the same way in each Member State. EC TREATY art. 220.

¹⁷³ Young, *supra* note 25, at 1631.

¹⁷⁴ Constitution for Europe, *supra* note 14, at art. I-28(1).

¹⁷⁵ *Id.* at art. I-28(2).

¹⁷⁶ *Id.* at art. I-26(5), art. I-26(6).

¹⁷⁷ Schepel & Blankenburg, *supra* note 171.

¹⁷⁸ See *supra* note 15. The Constitution introduces “categories of competence.” See Constitution for Europe, *supra* note 14, art. I-12. There are two categories of competence—exclusive and shared, respectively. *Id.* When the Union has exclusive competence in a specific area, only it may legislate. *Id.* at art. I-12(1). When the Union has shared competence in a specific area, legislation is coordinated between it and the

Constitution does not extend the Union's competences considerably in these areas¹⁷⁹ and, consequently, does not unduly disrupt the federalist balance.

Each subpart in Part IV will provide a brief history of EU activity in these two vital areas in order to provide context for the analysis of the relevant provisions of the Constitution. With respect to the common foreign and security policy, the Constitution introduces the new position of Union Minister for Foreign Affairs, and provides a mechanism for future defense cooperation.¹⁸⁰ These measures will serve to underpin the Union's credibility in the realm of foreign affairs, all in respecting Member State sovereignty in this sensitive area.¹⁸¹

In the area of justice and home affairs, qualified majority voting will be employed more widely overall.¹⁸² However, in the realm of cooperation in criminal justice and police matters, special procedures are retained that respect Member State autonomy, while also allowing for enhanced cooperation between willing Member States.¹⁸³

A. The Constitution and the Common Foreign and Security Policy

In signing the Maastricht Treaty, EU Member States embarked on a new phase in the process of EU integration as the CFSP came into force in 1993.¹⁸⁴ For nearly three decades after the European Community was born, the subjects of defense, security, and foreign policy were essentially taboo among Member States.¹⁸⁵ The incentive to integrate along these lines was lacking insofar as NATO provided adequate protection during the Cold War era.¹⁸⁶ As deeper integration along monetary lines resulted from the Maastricht Treaty, "Euroskeptics" lobbied against discussing further

Member States. *Id.* at art. I-12(2). Furthermore, Member States may act to the extent that the Union has not exercised, or has terminated its competence in a specific area. *Id.*

¹⁷⁹ Summary of the Agreement on the Constitutional Treaty, *supra* note 15.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ RAMSES A. WESSEL, *THE EUROPEAN UNION'S FOREIGN AND SECURITY POLICY: LEGAL INSTITUTIONAL PERSPECTIVE* 1 (1999); *See also* Duquette, *supra* note 158, at 173.

¹⁸⁵ Mark C. Anderson, *A Tougher Road to Hoe: The European Union's Ascension as a Global Superpower Analyzed Through the American Federal Experience*, 29 SYRACUSE J. INT'L. L. & COM. 83, 113 (2001).

¹⁸⁶ *Id.* Member States enjoying a strong relationship with the United States firmly opposed bringing security issues to the negotiating table in Maastricht. *Id.*

integration on the security front.¹⁸⁷ Eventually, a compromise was reached under which the EU could “assert its identity on the international scene, in particular through the implementation of a common foreign and . . . defense policy, which might in time lead to a common defense.”¹⁸⁸

In conformity with this compromise, the Treaty of Amsterdam of 1997 defined the five fundamental objectives of the CFSP: (1) safeguarding the common values, fundamental interests, independence, and integrity of the Union; (2) strengthening the security of the Union in all ways; (3) preserving peace and strengthening international security; (4) promoting international cooperation; and (5) developing and consolidating democracy and the rule of law, and respecting human rights and fundamental freedoms.¹⁸⁹ The means of achieving these objectives include: (1) defining the principles and general guidelines of the CFSP (a role played by the European Council); (2) deciding on common strategies; (3) adopting joint actions; and (4) strengthening Member State cooperation.¹⁹⁰ Under this language, both the Union and the individual Member States are responsible for the implementation of the CFSP.¹⁹¹ The landmark opinion of the European Court of Justice in *Van Gend en Loos*¹⁹² applies also to the CFSP in the sense that the CFSP constitutes a new legal order of international law for the benefit of which Member States have limited their sovereign rights.¹⁹³

Member States, however, retain substantial control over CFSP-related decision-making. First, the European Council provides the general guidelines that form the basis for the CFSP decisions taken by the Council of Ministers.¹⁹⁴ Both of these entities are free to favor national interests over pan-European interests, and, in so doing, may advocate policies favorable to

¹⁸⁷ William Bradford, *The Western European Union, Yugoslavia, and the (Dis)integration of the EU: The New Sick Man of Europe*, 24 B.C. INT'L & COMP. L. REV. 13, 37 (2000).

¹⁸⁸ TEU art. 2.

¹⁸⁹ *Id.* at art. 11.

¹⁹⁰ *Id.* at arts. 11–12.

¹⁹¹ WESSEL, *supra* note 184, at 54. Wessel argues that Article 11 refers to the Union as the only responsible actor for the definition and implementation of the CFSP and that Member States are to “support” the Union in this respect. *Id.*

¹⁹² See *supra* note 52.

¹⁹³ WESSEL, *supra* note 184, at 69.

¹⁹⁴ See Duquette, *supra* note 158, at 174. As a non-Community institution, the European Council is removed from the daily activities of the Union; however, its lofty composition ensures that the political direction and decision-making leadership of the CFSP comes from the highest levels of government in each Member State. *Id.*

their respective countries.¹⁹⁵ Second, CFSP decisions must be made unanimously.¹⁹⁶ The CFSP, therefore, does not constitute a common policy in the same way that the concept is used in the EU's Common Agricultural Policy or Common Economic Policy.¹⁹⁷ The deep division between the United Kingdom and Italy on the one hand, and Germany and France on the other, with respect to involvement in the U.S.-led invasion of Iraq in 2003 demonstrates that Member States are free to pursue their own foreign policies.¹⁹⁸

The Constitution ultimately preserves the ability of Member States to practice a foreign policy separate from the CFSP, but at the same time undertakes to achieve a more unified foreign policy. The new position of "Union Minister for Foreign Affairs" will aid in achieving this objective.¹⁹⁹ The Minister's role is to lead the EU's common foreign and security policy.²⁰⁰ The Minister's major functions include: (1) chairing the Foreign Affairs Council;²⁰¹ (2) ensuring the implementation of the European decisions adopted by the Council of Ministers and the European Council;²⁰² and (3) representation of the EU in political dialogues with third parties and at international conferences and organizations.²⁰³ In addition, for CFSP decisions taken by qualified majority voting,²⁰⁴ a Member State may

¹⁹⁵ WESSEL, *supra* note 184, at 320. He argues that within the scope of CFSP decisions, Member States have possibilities to emphasize certain national preferences and implementation modalities. *Id.*

¹⁹⁶ TEU art. 23(1).

¹⁹⁷ See Duquette, *supra* note 158, at 174.

¹⁹⁸ *Tidying Up or Tyranny?*, *supra* note 3. One view actually holds that the divisions over the Iraq war would not have manifested themselves if European countries would have been compelled to unite on foreign policy. Jennifer Joan Lee, *Charter Crafting Franklin-scale Task; Agreements on Goals but Disputes on How to Reach Them Risky for U.S.*, WASH. TIMES, Oct. 5, 2003, at A10. Giles Merritt, director of the independent think tank Friends of Europe argues that the Constitution could alleviate the current problem of Europeans having very divergent views on security policy. *Id.*

¹⁹⁹ Constitution for Europe, *supra* note 14, art. I-28(1). The Minister is elected by the European Council by qualified majority voting with the approval of the President of the European Commission. *Id.* The Minister's term may be ended in the same fashion. *Id.*

²⁰⁰ *Id.* at art. I-28(2).

²⁰¹ *Id.* at art. III-296(1).

²⁰² *Id.*

²⁰³ Constitution for Europe, *supra* note 14, at art. III-296(2).

²⁰⁴ Such decisions include adoption of European decisions: (1) defining a Union action or position on the basis of a European decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article III-293(1); (2) defining a Union action or position, on a proposal which the Union Minister for Foreign Affairs has presented following a specific request to him or her from the European Council, made on its own initiative or that of the Minister; (3) implementing a European

declare that it intends to oppose such a decision because of a vital national policy concern.²⁰⁵ In that event, no vote shall be taken.²⁰⁶ The Union Minister for Foreign Affairs will consult with the dissenting Member State in the hopes of finding an acceptable solution.²⁰⁷ However, if no such solution can be found, the Council of Ministers may, acting by qualified majority, request that the matter be referred to the European Council for a European decision by unanimity.²⁰⁸

This post essentially combines the current role of the EU's foreign policy representative and the external affairs member of the Commission.²⁰⁹ Currently, the individuals in these posts expend considerable energies in not overstepping each other's bounds.²¹⁰ The goal of combining these posts, thus, is to give the CFSP greater emphasis and to allow the disparate countries of Europe to have a unified voice.²¹¹ It must be noted, however, that the Minister's power is largely determined by the degree of consensus among the Member States—that is, the Minister must promote a unified agenda in order to be effective. The Minister must also consult and inform the European Parliament and ensure that the views of the Parliament are taken into account.²¹² The Parliament may also ask questions of the Council of Ministers and the Minister and make recommendations.²¹³

Under the Constitution, Member States may be able to undertake permanent structured cooperation within the Union framework.²¹⁴ This provision appears to allow France, Germany, Belgium, and Luxembourg to proceed with their plans to create a European defense union, despite British criticism that this measure would encroach on NATO's role.²¹⁵ Such

decision defining a Union action or position; and (4) concerning the appointment of a special representative in accordance with Article III-302. *Id.* at art. III-300(2)(a)-(d).

²⁰⁵ *Id.* at art. III-300(2).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Jack Rakove, *Europe's Floundering Fathers: European Union Proposed Constitution*, FOREIGN POL'Y, Sept. 1, 2003, at 28. Currently, Benita Ferrero-Waldner of Austria is the commissioner in charge of external relations and Javier Solana of Spain is the high representative of the CFSP.

²¹⁰ Mahony, *supra* note 84.

²¹¹ This provision addresses the famous conundrum faced by former Secretary of State Henry Kissinger when he complained that Europe did not have a telephone number. Lee, *supra* note 198.

²¹² Constitution for Europe, *supra* note 14, at art. III-304(1).

²¹³ *Id.* at art. III-304(2).

²¹⁴ Constitution for Europe, *supra* note 14, at art. I-41(6).

²¹⁵ Q&A: *EU Constitution Conference*, BBC NEWS ONLINE (Oct. 6, 2003), at <http://news.bbc.co.uk/1/hi/world/europe/1840926.stm>. The Constitution refers to "the

permanent structured cooperation is subject to certain conditions. The Member States involved must first notify their intention to the Council and to the Union Minister for Foreign Affairs.²¹⁶ Then, within three months following such notification, the Council shall, after consulting the Minister for Foreign Affairs, adopt a European decision by qualified majority.²¹⁷ Other Member States wishing to participate in the permanent structured cooperation may do so if they fulfill the criteria and the existing participants, by qualified majority²¹⁸ and after consulting the Union Minister for Foreign Affairs, vote to allow such a Member State to participate.²¹⁹

Member States participating in the permanent structured cooperation still retain a high degree of sovereignty. For example, they may, by qualified majority,²²⁰ vote to suspend the participation of a Member State who no longer fulfils the criteria and cannot meet the commitments.²²¹ In addition, for decisions not concerning the identity of the participants in the permanent structured cooperation, unanimity is required.²²²

The Constitution balances the competing views of those theorists who are against the emergence of a European super-state²²³ and those who believe in a federalist model which holds that a European democratic state can better address problems than a community of many states.²²⁴ On the one hand, the EU Constitution does not pretend to take away the ability of individual Member States to prevent the EU from engaging in military action, unlike the United States Constitution which mandates that individual states have no

progressive framing of a common Union defence policy." Constitution for Europe, *supra* note 14, at art. I-40(2).

²¹⁶ *Id.* at art. III-312(1).

²¹⁷ *Id.* at art. III-312(2).

²¹⁸ In derogation from the typical qualified majority provisions, qualified majority is attained when 55% of the Council representing the participating Member States, and comprising at least 65% of the population of those Member States, vote to allow such a Member State to participate. *Id.* at art. III-312(3).

²¹⁹ *Id.*

²²⁰ The percentages needed to attain qualified majority are the same as specified in *supra* note 218.

²²¹ Constitution for Europe, *supra* note 14, at art. III-312(4).

²²² *Id.* at art. III-312(6).

²²³ Eleftheriadis, *supra* note 132, at 31 (discussing Joseph Weiler's model that involves dual or multiple citizenship, according to which Community citizenship is disconnected from ethnic or other ties but requires a commitment to the duties and rights of a civic society covering discrete areas of public life).

²²⁴ *Id.* (discussing the view of federalists like Giuseppe Federico Mancini). Mancini, a former judge at the ECJ argues that the EU has already moved beyond the structures of an international organization and has so compromised the democratic institutions of the Member States that the only way to resolve the conflict between European and domestic institutions is to completely empower and democratize the EU. *Id.* at 26.

input as to whether the country can go to war.²²⁵ The Constitution merely states that Member States must “actively and unreservedly support” a common EU foreign policy.²²⁶ Despite this level of Member State autonomy, there have been calls for the new EU Minister for Foreign Affairs to report unambiguously to national governments in the Council of Ministers, rather than the civil servants of the European Commission.²²⁷ As a further safeguard, some have argued that more must be done to ensure that European defense policy supports, rather than undermines NATO.²²⁸ These concerns are certainly valid, but must not interfere with the process of rendering Europe capable of acting as a unitary body in promoting peace and security around the world. While the federalist balance swings toward greater Member State autonomy in the area of defense, the Constitution still reflects the prevailing view that Europe is much stronger when the Union and Member States act together in defense. Even if a constitutional model were to emerge with certain countries moving at a varying pace on defense issues,²²⁹ the Constitution has created a better mechanism for CFSP cooperation that will permit Europe to play a larger role on the world stage in the future.

B. *The EU Constitution and Justice and Home Affairs*

Justice and home affairs (JHA) is particularly relevant to the everyday lives of European citizens.²³⁰ Items affecting the daily lives of Europeans such as immigration, asylum, policing, and judicial cooperation (civil and criminal) are among the foremost matters on the European Union’s JHA agenda.²³¹ Perceiving a growing threat from crimes such as drug trafficking, terrorism, and art theft that often have a cross-border dimension, a growing focus has emerged in the EU on developing JHA cooperation.²³² In 1997, for example, seventy percent of all Council of Ministers texts were in the field of justice and home affairs.²³³ This development is remarkable in light of the

²²⁵ Article I of the Constitution grants Congress the power to declare war and the authority to raise and support the army and the navy. U.S. CONST. art. I, § 8.

²²⁶ Constitution for Europe, *supra* note 14, at art. I-15(2).

²²⁷ *Roman Carnival*, *supra* note 71.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Laurens Jan Brinkhorst, Essay, *Transparency in the European Union*, 22 FORDHAM INT’L L.J. 128, 134 (1999) (discussing the need for greater transparency in this area that has repercussions on the daily lives of Europeans).

²³¹ STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW 1 (2000).

²³² Steven Skinner, *The Third Pillar Treaty Provisions on Police Cooperation: Has the EU Bitten off More than It Can Chew?*, 8 COLUM. J. EUR. L. 203, 203 (2002).

²³³ Brinkhorst, *supra* note 230, at 134.

fact that until 1992, there was no formal JHA pillar. Early attempts to achieve JHA cooperation were formalized at negotiations leading to the signing of the Treaty of Maastricht in 1992,²³⁴ as justice and home affairs became the Third Pillar in the Treaty's three-pillared approach to European integration.²³⁵

The Treaty of Amsterdam, signed in October 1997, inaugurated an even more ambitious level of integration in justice and home affairs as the objective became to "maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime."²³⁶ Concrete steps toward achieving this integration led to the transfer of immigration and asylum matters to the European Community pillar, while police and judicial cooperation would remain in the JHA pillar.²³⁷

Third pillar police²³⁸ and criminal justice cooperation²³⁹ is "intergovernmental," and can be characterized by flexibility and wider discretion granted to national authorities.²⁴⁰ In order to achieve police cooperation, Member States, within the Council of Ministers, inform and consult each other with a view toward taking measures to further this cooperation.²⁴¹ All decisions, however, are taken unanimously.²⁴² In opposition to this strong intergovernmentalism, supranationalism typifies

²³⁴ PEERS, *supra* note 231, at 10. Before then, informal mechanisms of JHA cooperation were in place as interior ministers oversaw terrorism and policing under the name "Trevi." During the United Kingdom EU presidency in 1986, the "Working Group on Immigration" was established. *Id.* Conventions on judicial cooperation (whether criminal or civil) were held, and justice ministers also held conferences occasionally. *Id.*

²³⁵ Hartnell, *supra* note 17, at 71-73. Articles K to K.9 of the Treaty of Maastricht (now Articles 28-42 of the TEU) cover the bulk of JHA cooperation.

²³⁶ TEU art. 2.

²³⁷ PEERS, *supra* note 231, at 12.

²³⁸ Common action in the field of police cooperation includes: (1) operational cooperation between the competent authorities in each Member State; (2) information gathering and exchange; (3) joint initiatives in training, equipment use, and forensics; and (4) common techniques for detecting organized crime. *See* TEU art. 30(a)-(d).

²³⁹ Common action on judicial cooperation in criminal matters includes: (1) facilitating cooperation between Member State judicial authorities; (2) facilitating extradition; (3) ensuring compatibility in rules; (4) preventing conflicts of jurisdiction among Member States; and (5) progressively establishing common elements of criminal acts and penalties in the fields of organized crime, terrorism, and drug trafficking. *See* TEU art. 31.

²⁴⁰ Skinner, *supra* note 232, at 203.

²⁴¹ TEU art. 34(1).

²⁴² *Id.* at art 34(2).

asylum and immigration cooperation.²⁴³ Within the context of the Community pillar's decision-making process, the Council of Ministers adopts proposals from the Commission utilizing a qualified majority voting scheme.²⁴⁴

The existence of complex issues of sovereignty, national traditions, and politics is the main reason why police cooperation remains in the intergovernmental pillar.²⁴⁵ Yet, stubborn adherence to a state's sovereign status is difficult to reconcile with the increase in criminal activity in the EU by virtue of further integration and freedom of movement.²⁴⁶ Since immigration and asylum issues are dealt with on a qualified majority voting basis as opposed to the unanimity requirement for policing, it is more difficult to coordinate legislation in these complementary areas.

Under the Constitution, European laws on immigration and asylum will continue to be enacted using qualified majority.²⁴⁷ Judicial cooperation in civil matters will likewise be subject to qualified majority voting.²⁴⁸ However, with respect to judicial cooperation in criminal matters and police cooperation, special procedures have been put in place to respect Member State sovereignty to take into account the traditional intergovernmentalism.

In the realm of judicial cooperation in criminal matters, any EU laws establishing minimum rules in the area of judicial cooperation in criminal matters must take into account the differences between the legal traditions and systems of Member States.²⁴⁹ This provision would implicate the recognition of differences between common law Member States like the United Kingdom and Ireland, and the civil law Member States on the continent. In addition, any of the minimum rules established by the EU do not prevent Member States from maintaining or introducing a higher level of protection for individuals.²⁵⁰ If a Member State considers that a draft European framework law in this area would affect fundamental elements of its criminal justice system, it may request that the draft framework law be

²⁴³ Skinner, *supra* note 232, at 213. The Council is charged with progressively establishing an area of freedom, security, and justice by taking measures to ensure the free movement of persons, while also taking measures with respect to border controls, asylum, and immigration. See EC TREATY art. 61(a). Article 63 sets out the standards for achieving asylum status, while article 62 addresses visas.

²⁴⁴ EC TREATY art. 67.

²⁴⁵ Skinner, *supra* note 232, at 204.

²⁴⁶ *Id.*

²⁴⁷ Constitution for Europe, *supra* note 14, at art. III-266, art. III-267.

²⁴⁸ *Id.* at art. III-269.

²⁴⁹ *Id.* at art. III-270(2).

²⁵⁰ *Id.*

referred to the European Council.²⁵¹ The normal process for passing EU laws, as delineated in Article III-396, would consequently be suspended.²⁵² After discussion, and within four months of such suspension, the European Council shall either refer the draft back to the Council of Ministers and terminate the suspension or request the Commission or the Member State from whom the draft originated to submit a new draft in which case the original draft shall be deemed to have not been adopted.²⁵³ This measure provides Member States with an important avenue to preserve their sovereignty. At the same time, the Constitution allows Member States wishing to establish enhanced cooperation to do so. Such enhanced cooperation is contingent on the following: (1) the European Council does not act within the four-month period mentioned above or a new draft is submitted in accordance with Article III-270(3)(b) but is not adopted within 12 months; (2) at least one-third of the Member States wish to establish enhanced cooperation on the basis of the draft framework law adopted, and (3) such Member States notify the European Parliament and the European Commission.²⁵⁴ If this course of action is taken, the authorization for enhanced cooperation referred to in Articles I-44(2) and III-419(1) shall be deemed granted, and the provisions of Articles III-416 to III-423 will govern.²⁵⁵

In the realm of police cooperation, similar protective measures exist. The EU may pass European laws or framework laws concerning operational cooperation between the Member States' competent authorities.²⁵⁶ However, all such laws must be adopted unanimously by the Council of Ministers after consulting the European Parliament.²⁵⁷

Likewise, European laws concerning the conditions and limitations under which the competent authorities of Member States in the areas of judicial cooperation in criminal matters and police cooperation may operate in the territory of another Member State in liaison and agreement with that Member State must be adopted unanimously.²⁵⁸

²⁵¹ *Id.* at art. III-270(3). For purposes of clarification, a framework law refers to a legislative act binding as to the result to be achieved upon each Member State to which it is addressed, and that leaves the national authorities the choice of form and methods for its implementation.

²⁵² *Id.*

²⁵³ Constitution for Europe, *supra* note 14, at art. III-270(3).

²⁵⁴ *Id.* at art. III-270(4).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at art. III-275(3).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at art. III-277.

The proposals of the Constitution for further integration in the area of JHA present vital federalist concerns by virtue of the degree to which power is devolved to the EU institutions in these sensitive areas that have a more tangible effect on ordinary Europeans than other European regulations do. However, the Constitution's mechanisms for implementing EU objectives on the JHA front ensure that Member States are the ultimate guarantors of their sovereignty. For example, the Constitution mandates that the European Council "define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice."²⁵⁹ Furthermore, Member States' national parliaments would ensure that laws concerning judicial cooperation on criminal and police matters comply with the principles of subsidiarity and proportionality.²⁶⁰ Member States may, subject to passage of a law by the Council of Ministers, be able to participate in the evaluation mechanisms delineated in Article III-260 which permit the Council of Ministers and the European Commission to conduct objective and impartial evaluation of the implementation of JHA matters.²⁶¹ The Council of Ministers would also institute a standing committee to ensure that operational cooperation on internal security is promoted and strengthened within the EU.²⁶² Because members of the European Council and the Council of Ministers, along with national parliaments, primarily advance the interests of their respective Member States, the possibility of a drastic loss of sovereignty in these sensitive JHA matters is not significant. If such a loss of sovereignty occurs, it will be targeted at areas where a consensus of Member States recognizes the need for concerted action. In an age where crime and global terrorism know no borders, European nations must act concertedly. Since the Constitution's JHA provisions facilitate such concerted action, any loss of Member State sovereignty is outweighed by the collective benefits to European citizens resulting from decreased incidents of cross-border crime and global terrorism.

V. CONCLUSION

Currently, the European Union stands at a crossroads in its history. Internally, it faces many challenges, including the combating of cross-border

²⁵⁹ Constitution for Europe, *supra* note 14, at art. III-258.

²⁶⁰ *Id.* At art. III-259. *See also* Protocol on the Application of the Principles of Subsidiarity and Proportionality, *supra* note 62, at arts. 6-7.

²⁶¹ Constitution for Europe, *supra* note 14, at art. III-260.

²⁶² *Id.* at art. III-262. The European Parliament and national parliaments are to be kept informed of the proceedings. *Id.*

crime and terrorism,²⁶³ maintaining confidence in the euro by keeping Member State deficit levels in check,²⁶⁴ and reaching compromises in a wide variety of crucial policy areas. In addition, it has to continue to integrate new Member States into the European fold.²⁶⁵ Externally, the EU must become better equipped to deal with security matters both in Europe and abroad by acting with a more unified voice.

With its movement toward a more federal governing structure without unduly infringing on Member States sovereignty, the Constitution presents a framework within which tomorrow's challenges can be addressed, thereby resulting in a net benefit to the EU as an organization, as well as European citizens and businesses. Structurally, the European Community institutions will function more efficiently and transparently under the Constitution's reforms.²⁶⁶ The endowment of an EU legal personality will allow for more unified decision-making on the global stage.²⁶⁷ The Constitution's innovations in the common foreign and security policy will allow the EU to have a more authoritative voice in foreign affairs, and will provide the framework for a future common defense policy.²⁶⁸ In the justice and home affairs area, more cooperation between national police forces will result in a safer Europe that is better able to combat cross-border crime and work in unison to thwart potential terrorist attacks.²⁶⁹

While the Constitution alone may not solve the disconnect many Europeans feel toward the supranational institutions of the EU, and may continue to elicit criticism from "Euroskeptics," it represents a natural step on the road of European integration. The policy-making competence of the EU has steadily increased during the half-century of its existence.²⁷⁰ Under the concept of the legal supremacy of EU law, Member States have long accepted that EU law trumps national law in many areas.²⁷¹ In return for this devolution of power, the European Union has delivered a half-century of peace, stability, and prosperity. The euro, the Common Market, and the

²⁶³ See *EU to Push Through Terror Laws*, BBC NEWS ONLINE (Dec. 3, 2001), at <http://news.bbc.co.uk/1/hi/world/europe/1689216.stm>.

²⁶⁴ *Q&A: What is the European Stability Pact?*, BBC NEWS ONLINE, (Sept. 25, 2003), at <http://news.bbc.co.uk/1/hi/business/3139460.stm>. Under the stability pact, Eurozone countries are not supposed to run budget deficits above 3% of GDP (gross domestic product). *Id.*

²⁶⁵ *The EU's Eastward Drift*, BBC NEWS ONLINE (Mar. 5, 2004), at <http://news.bbc.co.uk/1/hi/world/europe/3272323.stm>.

²⁶⁶ See *supra* Part III.C and accompanying notes 48–175.

²⁶⁷ See *supra* Part III.B and accompanying notes 70–83.

²⁶⁸ See *supra* Part IV.A and accompanying notes 181–226.

²⁶⁹ See *supra* Part IV.B and accompanying notes 227–59.

²⁷⁰ See *supra* Part II and accompanying notes 15–47.

²⁷¹ See *supra* Part III.A and accompanying notes 48–52.

freedom to travel and work freely within the EU are among the most tangible benefits accruing from membership in the EU.²⁷² The Constitution provides a workable framework within which these benefits can continue to be enjoyed by current as well as future Member States.

²⁷² See *The EU at a Glance*, EUROPA: Gateway to the European Union, at http://europa.eu.int/abc/index_en.htm (last visited Mar. 10, 2005).

